

MADELINE T. WRAY
Claimant

WORKERS COMPENSATION FUND

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 74.5 percent work disability and assessed the entire Award to the respondent and its insurance carrier. The respondent requested this review and asks the Appeals Board to review the issues of:

- (1) Nature and extent of claimant's disability.
- (2) Fund liability.

Those are the only issues now before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Award entered by the Administrative Law Judge should be modified.

Claimant worked for the respondent for eight years until she was taken off work on January 7, 1994 due to her work-related injuries. During her employment with respondent, claimant worked as a file-maintenance clerk and also tended the back door and courtesy booth. In the spring of 1993, claimant began experiencing pain in her right shoulder, neck and right arm. Later, claimant experienced pain in her left arm as she would use that arm when her right arm tired.

On January 7, 1994, because her symptoms were worsening claimant first sought medical treatment for her symptoms and was immediately taken off work. On that date, claimant saw Dr. R. Burnley White at the Broadway Occupational Clinic, the facility respondent selected to provide authorized medical treatment. Although claimant's symptoms were greater on the right, Dr. White treated both upper extremities and prescribed traction for her neck. After a period of conservative treatment, Dr. White referred claimant to an orthopedic surgeon, Tyrone D. Artz, M.D. After initially treating claimant with cortisone injections, Dr. Artz transposed the ulnar nerve on the right elbow. When Dr. Artz released claimant to return to work in September 1994 respondent had initiated bankruptcy proceedings and was no longer in business. Although claimant had been looking for work, she had not found employment by the time of the regular hearing held in September 1995. At that hearing, claimant testified that she continued to experience problems with her right arm and shoulder and fatigue in the left arm.

The Workers Compensation Fund presented the testimony of R. Burnley White, M.D., the first physician claimant consulted for her injuries. Because of her complaints and the findings from the clinical examination on January 7, 1994, the doctor initially diagnosed right upper extremity reflex sympathetic dystrophy caused by overuse and bilateral epicondylitis. After a month of treatment claimant advised the doctor at her visit on February 11, 1994, that her right arm was better but her left arm was starting to get sore. Dr. White's final diagnosis was bilateral upper extremity reflex sympathetic dystrophy. He testified that, according to claimant's history, he believes claimant had reflex sympathetic dystrophy in the right upper extremity for approximately four years. He was unable to determine when claimant developed reflex sympathetic dystrophy in her left arm although she first complained to him of left upper extremity symptoms on February 11, 1994.

The respondent presented the testimony of both Philip R. Mills, M.D., and Tyrone D. Artz, M.D. Dr. Artz is a board-certified orthopedic surgeon who began treating claimant on February 23, 1994 at the respondent's request. At that time, claimant told Dr. Artz that she had experienced numbness, pain and discomfort in her right upper extremities since May 1993 and had developed numbness in her left hand over the last two or three weeks. Although Dr. Artz initially suspected carpal tunnel syndrome, he later changed his assessment to ulnar nerve compression at the right elbow. In June 1994 the doctor transposed the ulnar nerve at the right elbow. Earlier, the doctor administered pain blocks in the right shoulder which resolved claimant's right shoulder complaints.

After claimant's recovery from surgery, Dr. Artz ordered a functional capacities evaluation which indicated claimant could perform light work and lift 20 pounds one-third of each day and ten pounds two-thirds of each day. Also, the evaluation indicated claimant should limit the repetitive movements of her right hand and upper extremity to one-third of each day to avoid recurrence of the ulnar nerve problem. The doctor gave claimant a 10 percent functional impairment rating to the right upper extremity. Because claimant's left upper extremity was asymptomatic in September 1994 when he last saw her, Dr. Artz did not examine or evaluate the left side. Although on cross examination Dr. Artz testified he was unable to render an opinion as to what impairment, if any, claimant had in the right shoulder, neck or left arm, on redirect he stated it was his opinion that claimant did not have any permanent impairment to those areas of the body. However, he does acknowledge the functional capacities evaluation demonstrated loss of strength in the left upper extremity.

Dr. Mills is board certified in physical medicine and rehabilitation, electroneurodiagnostic medicine and pain management. He examined claimant at the Administrative Law Judge's request in May 1995. At that time, claimant told the doctor her job required repetitious data entry and over the years she noticed right arm discomfort which gradually increased in severity associated with pain in the right shoulder and upper extremity numbness. According to the history claimant gave Dr. Mills, she sought medical treatment because of numbness in her right fingers. Claimant reported to Dr. Mills that she was having bilateral shoulder pain and left wrist numbness while seeing Dr. Artz. At their meeting in May 1995, claimant told Dr. Mills that she was experiencing pain in her neck, right shoulder and right upper extremity. She also told the doctor that her left shoulder was not hurting but it tired easily. Based upon claimant's history and the clinical examination, Dr. Mills diagnosed post-surgical right ulnar nerve transposition, fibromyalgia in the neck area and right lateral epicondylitis which constituted a 10 percent functional impairment to the right upper extremity for the ulnar nerve injury and a 1 percent functional impairment to the whole body for the fibromyalgia which converted to a 7 percent whole body functional impairment. Dr. Mills did not find evidence that claimant had carpal tunnel syndrome. He believes that claimant should avoid repetitious or prolonged resisted right wrist flexion and extension.

Claimant presented the testimony of Ernest R. Schlachter, M.D., who examined her in October 1994 at her attorney's request. Claimant told Dr. Schlachter she first developed pain in her right upper extremity that gradually increased in severity with pain and numbness going into her right shoulder. She also told the doctor that in December 1993 she began to experience pain and numbness in her left hand and wrist. This doctor diagnosed overuse syndrome of the right shoulder girdle and right upper extremity, a failed ulnar nerve release at the right elbow, early carpal tunnel syndrome on the right and overuse syndrome on the left upper extremity with early mild carpal tunnel syndrome. Dr.

Schlachter testified that claimant has a 10 percent permanent partial functional impairment to the right shoulder, a 15 percent functional impairment to the right upper extremity and a 5 percent functional impairment to the left upper extremity all of which combine to a 17 percent whole body functional impairment. He also believes claimant should avoid repetitiously lifting more than 10 pounds with either arm or hand and 15 pounds on a single basis with either arm or hand; avoid repetitive pushing, pulling, twisting or grasping motions with either arm or hand; avoid repetitive use of the arms above the horizontal; avoid pushing and pulling movements with the shoulders; and avoid vibratory tools and cold environments.

As did the Administrative Law Judge, the Appeals Board finds that claimant has sustained a general bodily injury as a result of working for the respondent through January 7, 1994, and is entitled to receive permanent partial general body disability benefits. This conclusion is based upon claimant's testimony that she began to experience left upper extremity symptoms while working for the respondent and was experiencing those symptoms when she first saw Dr. Artz in February 1994. Also, as indicated above, Dr. Schlachter found and diagnosed left upper extremity overuse syndrome when he examined claimant in October 1994. Because hers is an "unscheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e which provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Claimant testified that within the 15-year period before leaving work in January 1994 that, in addition to her job with respondent as a file-maintenance clerk, she worked as a cashier and salad bar worker at a steak house, head cashier at a discount store, cashier at a truck stop, and as a remodeler at another discount store. Claimant introduced into evidence lists of her various job tasks from those jobs and testified that the information contained in those lists was accurate.

Regarding claimant's job at the steak house, a Sirloin Stockade, claimant listed the following 18 tasks: prepared salads; prepared and filled salad bar; wrapped and baked potatoes; prepared desserts; cleaned out refrigerators; took orders; ran cash register; bussed tables; took orders to tables; helped cook; vacuumed carpet; mopped and swept floors; washed dishes; cleaned glass; filled condiments; checked in deliveries; put away delivered items; and took out trash and boxes.

As head cashier for a Gibson's Discount Store, claimant listed the following 21 tasks: supervised grocery department; supervised checkers; ran registers; sacked items; carried out items; brought in carts; filled out reports; took care of change drawer; swept

floors; cleaned glass; checked in vendors; stocked shelves; ran jewelry counter; unloaded trucks; made signs; hung up signs; put up displays; priced items with a ticket gun; helped to make newspaper ads; took cash drawers to safe; and burned boxes.

At a local truck stop, Newell Truck Plaza, claimant had the following seven tasks: ran cash register; dusted; cleaned glass; stocked items; priced items; swept and mopped floors; and prepared reports.

As a remodeling crew worker for T G & Y, claimant performed the following nine tasks: built and tore down shelves; loaded shelves to cart; built and tore down peg board; priced items; stocked items; painted shelves and peg boards; swept floors; unloaded boxes from pallets; and tagged shelves.

Finally, her last job over the 15-year period before leaving work in January 1994 was with the respondent where claimant performed the following 46 tasks: tore apart and placed tags on plastic; hung tags for price changes; computer work; made signs for display; checked E-mail on the computer; made and sorted signs for ads; hung and tore signs down; used hand-held computer to check ads; used hand-held computer to check prices in store; checked and loaded items into the computer; made signs for meat department, produce and new displays; scanned cartloads of groceries; ran cash register; sacked groceries; carried groceries out to cars; brought carts from parking lot; made money orders; answered phones; sold lottery tickets; cashed checks; distributed money to registers; checked in vendors; counted vendor's items; unloaded trucks with power jack; cleaned damaged items and placed in box; loaded damaged boxes onto pallets; filled and tagged each vendor's sheet; bailed boxes; bailed bailer; swept floors; prepared reports; placed bales on pallets; removed items from pallets; placed items on a six-wheeler; pushed six-wheeler onto floor and stocked items; fried food for hot trays; prepared salads; sliced meats and cheeses; cleaned glass in case; cleaned out case and hot tables; washed dishes; cleaned refrigerator and frozen food walk-in; prepared trays; swept and mopped floors; wrapped food trays; and took boxes and trash out.

Through claimant's testimony, respondent has established that some of the above tasks are duplicative. Claimant testified that running the cash register at Sirloin Stockade was similar to the task at Gibson's Discount Store and Newell Truck Plaza and that both sacking and carrying out items at Gibson's was similar to the same two tasks she performed for the respondent. Likewise, the three tasks of making signs, hanging signs and putting up displays at Gibson's was similar to those same tasks at respondent's. Other tasks that were duplicated in claimant's lists are: unloading trucks; stocking shelves; cleaning glass; pricing items; preparing reports; and tagging shelves according to claimant. The Appeals Board finds a total of 17 tasks are duplicated in claimant's lists. Eliminating the duplicate job tasks, the Appeals Board finds that claimant has performed approximately 84 different job tasks in the 15-year period preceding the date of accident.

After reviewing the list of job tasks that claimant testified she performed over the 15-year period preceding her date of accident, Dr. Schlachter testified that claimant could perform 24 out of 46, or 52 percent, of her former tasks at Food Barn; 1 out of 9, or 11 percent, of her former tasks at T G & Y; 4 out of 7, or 57 percent, of her former tasks at Newell Truck Plaza; 13 out of 21, or 62 percent, of her former tasks at Gibson's Discount Store; and 13 out of 18, or 72 percent, of her former tasks at Sirloin Stockade. Therefore, before adjusting for duplicative tasks, claimant retains the ability to perform approximately 55 out of a total of 101 job tasks utilizing Dr. Schlachter's restrictions. Considering

claimant's testimony regarding similar job tasks, and eliminating those duplicative tasks, the Appeals Board finds that claimant could presently perform approximately 51 out of 84, or 61 percent, of the different tasks she previously performed according to Dr. Schlachter.

The Appeals Board agrees with the Administrative Law Judge and finds that Dr. Schlachter's opinion is uncontroverted regarding what tasks claimant can no longer perform as a result of her permanent work restrictions and limitations. After eliminating the tasks which respondent has established were duplicative, the Appeals Board finds claimant can no longer perform 39 percent of the total tasks she performed over the 15-year period preceding January 7, 1994. Because claimant has tried unsuccessfully to find work within her restrictions, the Appeals Board finds that claimant has established a 100 percent difference in her pre-injury and post-injury wages. As required by statute, the 39 percent task loss and 100 percent wage loss are averaged and produce a 69.5 percent permanent partial general disability.

The Appeals Board agrees with the analysis and conclusion of the Administrative Law Judge regarding the liability of the Workers Compensation Fund. The Appeals Board agrees that under the facts of this case the respondent failed to prove that claimant sustained a second work-related injury. To the contrary, the evidence establishes that claimant sustained one work-related accident and injury produced by a series of mini-traumas that culminated on her last day of work on January 7, 1994. Under the rationale set forth in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), claimant's last day of work is the date of accident for these repetitive-use injuries. Therefore, the Workers Compensation Fund has no liability in this proceeding.

The Appeals Board hereby adopts all findings and conclusions contained in the Award entered by the Administrative Law Judge to the extent they are not inconsistent with those specifically made herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated November 30, 1995, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Madeline T. Wray, and against the respondent, Food Barn, and its insurance carrier, Credit General Insurance Company, for an accidental injury which occurred on January 7, 1994 and based upon an average weekly wage of \$440.68, for 37 weeks of temporary total disability compensation at the rate of \$293.80 per week or \$10,870.60, followed by 273.14 weeks at the rate of \$293.80 per week or \$80,248.53 for a 69.5% permanent partial general disability, making a total award of \$91,119.13.

As of July 19, 1996 there is due and owing claimant 37 weeks of temporary total disability compensation at the rate of \$293.80 per week or \$10,870.60, followed by 95 weeks of permanent partial disability compensation at the rate of \$293.80 per week in the sum of \$27,911, for a total of \$38,781.60 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$52,337.53 is to be paid for 178.14 weeks at the rate of \$293.80 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders of the Administrative Law Judge as set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
 Stephen A. McManus, Kansas City, KS
 Kendall Cunningham, Wichita, KS
 Shannon S. Krysl, Administrative Law Judge
 Philip S. Harness, Director